

In the Matter of the Compensation of
FLORENCE M. NORWOOD, Claimant

WCB Case No. 11-04948

ORDER ON REVIEW

J Michael Casey, Claimant Attorneys

Radler Bohy et al, Defense Attorneys

Reviewing Panel: Members Weddell and Langer.

Sedgwick CMS (Sedgwick), the statutory assigned claim processing agent for the noncomplying employer, requests review of Administrative Law Judge (ALJ) Fisher's order that set aside its denial of claimant's injury claim for multiple conditions. Claimant cross-requests review seeking a penalty for an allegedly unreasonable denial and sanctions for an allegedly frivolous request for review. On review, the issues are course and scope of employment, penalties, and sanctions.

We adopt and affirm the ALJ's order through the first sentence on page 6, with the following supplementation.

Claimant sustained multiple injuries when a car hit her while she was walking back to her place of employment after taking mail to the post office for the employer. Sedgwick denied claimant's injury claim, contending that the injuries did not arise out of and in the course of her employment.

The ALJ found that claimant's injuries occurred while she was working, *i.e.*, returning to her place of employment after performing a work-related task (a "post office" errand for the employer). Accordingly, the ALJ concluded that the injuries occurred in the course of claimant's employment.

Sedgwick argues that the principal reason that claimant left her workplace on the day in question, was to walk for her own personal pleasure. (*See* Tr. 62). However, it is undisputed that the post office was claimant's only destination. Moreover, she paid for postage to mail the employer's business mail with a business check signed by the employer. Finally, claimant was returning to the office after completing this task when she was injured. (*See* Ex. 16-7).

Based on this evidence, we are not persuaded that personal pleasure was the principal reason for claimant's activity at the time of her injury. *See* ORS 656.005(7)(b)(B); *Roberts v. SAIF*, 341 Or 48, 56 (2006) ("Only if the worker's

personal pleasure was the fundamental or principal reason, in relation to work-related reasons, for engaging in the activity would the resulting injury be non-compensable.”).

Sedgwick cites *Victor Alicea*, 63 Van Natta 1964 (2011), in support of its contention that claimant’s injury did not occur in the course of her employment. In that case, the claimant, a bus driver, was injured on a public sidewalk, between shifts. We concluded that the “going and coming” rule applied without exception.

Here, in contrast to *Alicea*, the “special errand” exception to the “going and coming” rule applies, because claimant had just completed an errand for the employer when she was injured. Under these circumstances, and for the reasons expressed by the ALJ, we find that claimant’s injuries occurred in the course of her employment.

In addition, we conclude that claimant’s injuries “arose out of” claimant’s employment. We reason as follows.

A worker’s injury is deemed to “arise out of” employment “if the risk of the injury results from the nature of his or her work or when it originates from some risk to which the work environment exposes the worker.” *Fred Meyer, Inc. v. Hayes*, 325 Or 592, 601 (1997); *Krushwitz v. McDonald’s Restaurants*, 323 Or 520, 525-26 (1996); *Norpac Foods Inc. v. Gilmore*, 318 Or 363, 366 (1994). “That assessment, in turn, implicates categorization of the risk,” specifically: “Risks distinctly associated with the employment are universally compensable; risks personal to the claimant are universally noncompensable; and neutral risks are compensable if the conditions of employment put claimant in a position to be injured.” *Legacy Health Sys. v. Noble*, 250 Or App 596, 602 (2012) (quoting *Panpat v. Owens-Brockway Glass Container*, 334 Or 342, 349-50 (2002)).

Sedgwick argues that claimant was not working when she was injured because she “volunteered” to post mail for the employer on the date of her injury. However, claimant was already working that day, and we are not persuaded that she stopped working when she left for the post office. Moreover, as claimant notes, the employer not only acquiesced in her performing this errand, it also facilitated the mailing task. That is, the employer provided a signed blank business check so that claimant could purchase postage for the employer’s business mail on this errand. (Tr. 36-38). The record does not establish that claimant had any destination other than the post office when she left or that she had any destination other than the employer’s office after accomplishing this errand. (*See* Tr. 48).

Furthermore, claimant had previously performed similar errands, while working for the employer. (*See* Tr. 30-34, 48-49; Ex. DD). Thus, although she performed most of her work activities at home or at the employer's place of business, this "post office errand" was a "work activity" and the injury occurred when claimant was returning to her regular workplace minutes after conducting the employer's business at the post office. (*See* Exs. B, DD-3, 16-7). Under these circumstances, we find that the risk of claimant being hit by a car in a cross-walk while returning to the workplace from a work-related destination was a risk distinctly associated with her employment; *i.e.*, a risk of injury that resulted from the nature of her work. Thus, claimant's injuries arose out of her employment.

Sedgwick relies on *David Birdwell*, 55 Van Natta 647 (2003), and *Gordon G. Gago*, 43 Van Natta 329 (1991), where the claimants' injuries from motor vehicle accidents were not compensable. These cases are distinguishable, however, because the claimants had stopped working and they were heading home when they were injured.

Sedgwick also relies on *Kevin G. Robare*, 47 Van Natta 318 (1995), in support of its argument that claimant's injuries were unrelated to her work. In *Robare*, the claimant was injured choking on water and passing out during his lunch hour. We found these circumstances unrelated to any hazard of the work premises or to the claimant's work activities. *Robare* is distinguished from the present case, because we find that the risk of claimant's injury was work-related, in that she was returning to her work place just after performing an errand for the employer.

Accordingly, because claimant's injuries occurred in the course of her employment, and they arose out of that employment, her claim is compensable. *See Hayes*, 325 Or at 596 (for an injury to be compensable, both the "arise out of" and the "in the course of" prongs of the work-connection test must be satisfied to some degree); *see also Halsey Shedd RFPD v. Leopard*, 180 Or App 332, 336 (2002) (the work-connection test may be satisfied if the factors supporting one prong of the statutory test are weak while the factors supporting the other prong are strong). Consequently, we affirm the ALJ's decision.

Claimant also seeks a penalty for an allegedly unreasonable denial. However, she did not raise this issue at the hearing level. We decline to deviate from our general practice of not considering issues raised for the first time on review. *See Stevenson v. Blue Cross*, 108 Or App 247 (1991) (Board can refuse to consider issues on review that are not raised at hearing); *Fister v. South Hills*

Health Care, 149 Or App 214 (1997) (absent adequate reason, Board should not deviate from its well-established practice of considering only those issues raised by the parties at hearing).

Finally, claimant seeks sanctions, contending that Sedgwick's arguments are "totally lacking in foundation." Based on the following reasoning, we deny claimant's request.

Pursuant to ORS 656.390(1), we may impose an appropriate sanction if the request for hearing or review was frivolous or was filed in bad faith or for the purpose of harassment. "Frivolous" means the matter is not supported by substantial evidence or was initiated without reasonable prospect of prevailing. ORS 656.390(2).

Here, Sedgwick presented colorable arguments on review that were sufficiently developed to create a reasonable prospect of prevailing. Although these arguments did not ultimately prevail, we do not agree with claimant's assertion that Sedgwick's request for review was "frivolous," filed in bad faith or for the purpose of harassment. Accordingly, we deny claimant's request for sanctions under ORS 656.390(2).

Claimant's attorney is entitled to an assessed fee for services on review. ORS 656.382(2). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable fee for claimant's attorney's services on review regarding the "course and scope" issue is \$4,000, payable by Sedgwick on behalf of the noncomplying employer. In reaching this conclusion, we have particularly considered the time devoted to the issue (as represented by claimant's respondent's brief), the complexity of the issue, the value of the interest involved, and the risk that claimant's counsel may go uncompensated.¹

Finally, claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by Sedgwick, on behalf of the noncomplying employer. See ORS 656.386(2); OAR 438-015-0019; *Gary E. Gettman*, 60 Van Natta 2862 (2008).

¹ Claimant's counsel is not entitled to an attorney fee for services on review devoted to the penalty and sanction issues. See *Saxton v. SAIF*, 80 Or App 631, *rev den*, 320 Or 159 (1986); *Dotson v. Bohemia, Inc.*, 80 Or App 233, *rev den*, 302 Or 35 (1986).

ORDER

The ALJ's order dated June 11, 2012, as corrected June 12, 2012, is affirmed. For services on review, claimant is awarded an assessed fee of \$4,000, payable by Sedgwick, on behalf of the noncomplying employer. Claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by Sedgwick, on behalf of the noncomplying employer.

Entered at Salem, Oregon on January 23, 2013